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In the Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, ET AL., APPELLANTS

v.

BETTY-LOUISE FELTON, ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF EDUCATION

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1. Appellees' brief is striking—almost brutal—in its candor. They acknowledge (Br. 15) that New York City's Title I program is a "good and success-

ful" program that "has * * * contributed substantially to the educational needs of educationally deprived children." They do not seriously dispute (see Br. 6-7) the unanimous opinions of the courts below that, to be effective in reaching educationally deprived children attending private schools in New York City, remedial instruction must be provided on the premises of the private schools. Since, in their view, the Establishment Clause prohibits New York from conducting such an (effective) program, the solution is neat and simple. New York City, they say with aplomb, should simply end the attempt to provide remedial instruction to private school students (Br. 15, 23):

> If * * * the program were redesigned to eliminate that portion in operation in church schools, there would be more than enough eligible students attending public schools (who live in the same school districts and come from the same economic background as the eligible students attending the church schools) for whose benefit the funds used to finance the eliminated portion could be spent. In short, there would not be the slightest diminution in the total number of educationally deprived children whose needs the redesigned program would meet.
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> * * * * *
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> As noted above * * *, if the funds available to the program are not used for the benefit of students attending church schools, they can be put to full use for the benefit of an equal number of students attending public schools in the same areas.

But this disregard for the interests of poor and educationally deprived children who happen to be attending nonpublic schools wholly ignores the fact that

Congress has made a dramatically different judgment. Congress has repeatedly determined that it is the national policy that *all* children should have equal access to this program, whether they attend public or private school. More specifically, Congress has *required* (and nothing in the judgment below invalidates the requirement) that children attending private schools be provided Title I services " 'comparable in quality, scope and opportunity for participation to those provided for public school children with needs of equally high priority' " (*Wheeler* v. *Barrera*, 417 U.S. 402, 407 (1974); see 20 U.S.C. 2740(a), 3806(a); 34 C.F.R. 200.70, 200.71). Accordingly, if the judgment below is affirmed, appellees' suggestion that children in private schools be expelled from the Title I program cannot be followed. Rather, the New York City Board of Education will be required to provide nonpublic school children off-premises Title I services comparable to the on-premises services provided to public school children.[1] This will, as the court of appeals recognized (J.S. App. 52a), result in substantially more expensive, less effective, services for fewer needy children. The consequences of the ineffectiveness may well be borne by the private school children alone; the increased cost, however, will be allocated to the entire Title I program. See Gov't Br. 10 n.8. The record shows that some 5,000 children would be forced

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[1] Experience suggests that, as an educational matter, off-premises programs may never be fully comparable in quality to on-premises programs. The reasons for this are set forth in detail, with citations to record evidence, in our opening brief (at 9 & n.6, 10-11 n.9). Appellees assert (Br. 38) that the "principal[]" reason why on- and off-premises programs are qualitatively different is the "close working relationship" between Title I and regular teachers under the on-premises approach. In fact, although not insignificant, this factor is far less important than other reasons, such as transportation cost and safety factors, student and teacher fatigue, poor attendance, conflicts with other activities, and stigma.

out of the New York City Title I program each year because of the increased noninstructional costs imposed by the judgment below (J.S. App. 8a-9a, 72a-73a; J.A. 66-67). Because Title I primarily serves public school students, most of those displaced would be from public schools.[2]

In any event, Congress has decided—and appellees expressly concede (Br. 26)—that it is a wholly secular purpose to provide vital remedial educational assistance to *all* disadvantaged school children, private and public, who would not otherwise receive it. Whether or not this is constitutionally required (see *id.* at 23-24), Congress's determination that this is what *fairness* demands—that supplementary educational programs designed to counteract the effects of poverty and funded by all taxpayers should be extended to eligible children without regard to whether they have chosen to attend a private school—should not be casually overridden.

2. Appellees depart in large measure from the abstractions that led the court of appeals to strike down this program without even analyzing "the considerable evidence concerning [its] actual working" (J.S. App. 37a). They attempt to persuade this Court that —contrary to the view of court of appeals (*id.* at

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[2] The Secretary has interpreted the "comparability" requirement of Title I to require that expenditures for instructional services and arrangements for eligible public and nonpublic school children be equal (consistent with any special educational needs) and that the costs of general administration and transportation be allocated to the program as a whole. See, *e.g.*, Decision of the Commissioner, *In re Norfolk, Virginia School District (Title I Elementary & Secondary Education Act, Bypass)*, No. OA-11 (Dec. 10, 1979); see also S. Rep. 95-856, 95th Cong., 2d Sess. 19 (1978); H.R. Rep. 95-1137, 95th Cong., 2d Sess. 32 (1978). Accordingly, the increased transportation and other noninstructional costs associated with an off-premises program for private school children would divert resources that would otherwise be used for both public and nonpublic school children.

52a)—the program in fact *has* done "detectable harm." They do so by culling miscellaneous bits of evidence, not credited or found significant by the two district courts that examined the facts, and pasting them together with speculations not supported (and in some instances contradicted) by the record.[3] Appellees' idiosyncratic account of the operations of this program completely ignores the elaborate findings made by two district courts, findings that were not questioned by the court of appeals. A few examples will suffice.

a. Appellees assert (Br. 7) that the benefits of Title I "are extended to church school students on a school-by-school basis" and that "the selection of the individual students who participate in the program within each church school is in major part made by the church school teachers and principal." These statements are inaccurate.

Eligibility for Title I services is determined on the basis of public school attendance areas and individual measures of educational deprivation. J.A. 39-42. If a public school attendance area is determined to be eligible (a determination made on the basis of the concentration of low-income children in the area), then any child living within that area, whether he

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[3] At the same time, appellees dismiss as mere allegations or claims facts that were so found by the courts below. See, *e.g.*, Appellees' Br. 6-7 (questioning whether New York had actually tried the alternatives discussed by court of appeals at J.S. App. 7a-9a and the *PEARL* court at J.S. App. 71a-73a); Appellees' Br. 10 & n.6 (questioning the evidence concerning Title I teachers' religious affiliation, discussed by the court of appeals at J.S. App. 12a and the *PEARL* court at J.S. App. 74a); Appellees' Br. 49 (characterizing as "alleged" the absence of documented instances of impermissible conduct by Title I teachers, noted by the court of appeals at J.S. App. 13a, the district court at J.S. App. 56a, and the *PEARL* court at J.S. App. 85a, 91a, 92a).

attends public or private school, is eligible for participation in Title I provided he is "educationally deprived," *i.e.*, performs at a level below normal for his age (34 C.F.R. 200.3(b)). Eligibility is thus determined entirely on the basis of the child's residence and educational need. J.A. 42.[4]

Among eligible students within a school, Title I teachers and officials select actual participants strictly on the basis of educational need. While the Title I professionals may take into consideration information provided by the child's regular classroom teacher or principal (J.A. 50), the record clearly demonstrates that the ultimate decision is made by the Title I professional alone. J.A. 50-51. In actual practice, the selections are made almost entirely on the basis of standardized tests administered by Title I personnel. (*Ibid.*; see, *e.g.*, DX U, Tabs A-8, at 4, A-12, at 4, A-13, at 3-4, A-14, at 3-4, A-15, at 4 (affidavits of Title I teachers)).[5]

b. Appellees assert (Br. 11) that the Title I teachers "appear to give far less attention to their instructions than to the advice and recommendations of church school personnel." Nothing in the record supports this extraordinary claim. As found by the *PEARL* court (J.S. App. 91a) and adopted by refer-

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[4] Of course, private schools have the ability to exclude Title I teachers from their premises, or to deny Title I officials information necessary to determine pupil eligibility. Only in this sense might it be said that the private school has any control over whether its students will receive Title I services.

[5] The only support appellees cite for their contrary assertion is their own selective set of quotations from evaluation reports on the program, not credited by the courts below. J.A. 237-250. Even so, the quoted statements suggest only that recommendations of regular classroom teachers and principals were among the criteria considered by Title I teachers in making their selections of Title I participants. J.A. 239, 242, 244.

ence by the district court below (J.S. App. 56a), "[t]he abundant evidence presented in this action demonstrates uniform compliance with the extensive Title I regulations." Further, "[p]eriodic evaluations and direct program supervision assure that Title I staff members comply with the Board's guidelines and restrictions" (*id.* at 74a). There are no known instances of deviation from those instructions (J.A. 52, 53). The court of appeals itself acknowledged (J.S. App. 4a) that the Board's efforts in this regard have been "sincere and largely successful." The pages in the Joint Appendix (J.A. 237-250) cited by appellees (Br. 11) contain nothing that would cast any doubt on this conclusion.

c. Appellees greatly exaggerate (Br. 37) the degree of contact between Title I teachers and the faculty of the private school, and the degree to which the Title I teacher participates in the life of the private school. Without any citations to the record, appellees state (*ibid.*) that the Title I teacher "becomes a member of the church school faculty" and that the Title I teacher and the regular classroom teacher "are closer together, at least in the educational process, than any two members of the church school faculty." Appellees also assert (*id.* at 14-15 n.11) that Title I and regular classroom teachers engage in "team teaching." The courts below, including the court of appeals, concluded otherwise.

The *PEARL* court characterized the on-premises Title I program as a "school within a school" (J.S. App. 98a (citation omitted)), noting that "Title I supervisors maintain a complete separation between Title I activities and the regular programs of the parochial schools." J.S. App. 98a-99a. Neither "team teaching" nor any other "cooperative instructional ac-

tivities" are permitted. *Id.* at 74a. The court of appeals stated (J.S. App. 14a (citation omitted)) that " 'Title I creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school.' "[6]

Although Title I teachers may "discuss a student's needs and progress with their counterparts on the parochial school faculty" (*PEARL*, J.S. App. 74a), those contacts have a strictly limited focus. Appellees' vision of "constant communication" (Br. 37) and a "close working relationship" (*id.* at 38), in which the Title I teacher instructs the regular classroom teacher about how to "understand the problems and the solutions to the problems of the Title I students" (*id.* at 37) is entirely imaginary.

d. Appellees implicitly admit that the factual record does not support their position. That is why they ask this Court to permit them a second opportunity, on remand, to produce additional evidence (Br. 49 n.20). We oppose this suggestion. Appellees had a full opportunity to adduce whatever evidence they deemed relevant; that the factual findings of the district court are unfavorable is no reason to provide them a second bite at the apple.[7]

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[6] The court identified this statement as a summary of the defendants' factual position, but noted elsewhere that it was relying on the defendants' statement of facts, which was essentially undisputed. J.S. App. 10a.

[7] In this connection, we would note that the amicus curiae brief filed by Americans United for Separation of Church and State, et al., attempts to put before this Court certain evidence in the Title I case pending in Missouri, *Wamble* v. *Bell*, Civ. No. 77-0254-CV-W-8 (W.D. Mo. filed Apr. 4, 1977). In addition to being entirely irrelevant to this case, the evidence presented by amici reflects a one-sided and misleading view of the Missouri case. The

3. Appellees attempt to show (Br. 26-29) that the New York Title I program has the "primary effect" of "inhibiting religion," most importantly because of the "inevitable tendency" of private religious schools that wish their students to be able to participate in Title I "to make themselves, or make themselves appear to be * * * less sectarian—i.e., less religious" (*id.* at 29). But there is absolutely no evidence in the record to support this speculation; indeed, appellees themselves assert elsewhere (*id.* at 38-40) that the schools involved in this case remain robustly sectarian even after almost 20 years of the program. And it is undisputed that neither the federal government nor the Board of Education makes any inquiry regarding the religiosity of a private school at which Title I services are provided.[8] All that is required of the private school is that it permit access by Title I personnel and provide a religiously neutral classroom. Beyond those simple requirements, the school may be as "religious" as it sees fit, and the existence of the Title I program has no effect, one way or another, on its religious practices.[9]

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district court in *Wamble* has not made any of the determinations of credibility or probative value that will be necessary before undigested evidence of this sort could properly be evaluated.

[8] As it happens, the *PEARL* court concluded that the nonpublic schools involved in the New York program are not "pervasively sectarian" as that term has been used in this Court's cases. J.S. App. 96a.

[9] We question appellees' standing to complain of inhibitions on the religious rights of their opponents in this litigation. See *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961). If the religious schools of New York consider it consistent with their faith and practice to provide religiously neutral classrooms for Title I instruction, who are appellees to tell them otherwise?

4. Appellees also argue, somewhat inconsistently, that the "primary effect" of the New York program is to "advance religion" (Br. 29-42). This argument was rejected by the district court, and not addressed by the court of appeals. Appellees' reasons are not persuasive.

The only "particular conduct" of Title I personnel that appellees suggest violates the "primary effect" test is the supposed "close working relationship" (but see pages 7-8, *supra*) between them and the regular classroom teachers and principals, which "inevitably aids the church school personnel, particularly the regular classroom teachers, in *all* of their courses, and, specifically, in reintegrating the Title I students into all of those courses" (Br. 42 (emphasis in original)). The suggestion seems to be that it is impermissible for public school teachers to behave in such a way as to enable private religious school teachers to teach more effectively. But this is an astonishing suggestion. The Establishment Clause has never been thought to prohibit government from practices that have the indirect effect of improving the quality of teaching in private religious schools. If it did, government would be barred from practices such as setting standards for and accrediting religious schools (cf. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925)), or even allowing present or future religious school teachers to attend public universities. Educational training courses provided on an even-handed basis to all teachers, private and public, are unquestionably constitutional. And it is perverse to suggest that the Title I program is unconstitutional because one of its indirect effects may be to improve the quality of the education ~~received in~~ that private schools provide to their own students.

In fact, the record in no way supports the notion that the Title I program is either intended to provide supplemental training for private school *teachers* or has that as its effect. The most that can be supposed is that private school youngsters who have been helped by the Title I remedial program will be more successful in all their classes, thus improving the quality of the entire program—an "effect" of Title I that is, happily, entirely constitutional.

Appellees also suggest (Br. 36) that the "prestige" of the Title I teacher is "transferred to the school in which he teaches," and that this has a "coerceive effect" on the students. In a similar vein, amicus curiae the Anti-Defamation League suggests (Br. 16) that "the availability of on-site remedial education services operates as a powerful enrollment inducement for parochial schools." In fact, however, Title I services are provided on a comparable basis in public and nonpublic schools alike. The effect, therefore, is neutral; private schools neither gain nor lose, relative to public schools, with respect to prestige or enrollment as a result of the program.

Finally, appellees attempt to draw an analogy bebetween Title I teachers and the various forms of instructional materials that this Court has held may not be provided to private schools (Br. 35). Such materials can be diverted to nonsecular use by the private school teachers; to provide it, therefore, might advance the religious teaching of the schools.

The analogy cannot be stretched to Title I teachers for the simple reason that teachers cannot be "used" or "diverted" by private schools. Unlike a map or an item of audiovisual equipment, a teacher is in control of himself. The record establishes that the Title I teachers are not under the control or supervision of private schools officials, that they have not been pres-

sured to conform their teaching to the religious dictates of the private schools, and that they have not done so (J.A. 52, 53-54, 81).

Appellees use this analogy to support their claim (Br. 41) that it "is simply not true" that the benefits of the Title I program flow directly to the students. We think appellees miss the point. As this Court recognized in *Wheeler* v. *Barrera*, 417 U.S. at 406 (emphasis in original), the Title I program is structured to ensure that the benefits are provided directly "to educationally deprived *children* rather than to specific schools." Our opening brief (at 23, 30-32) elaborates the point.[10] Appellees' theory that because the assignment, movement, and scheduling of the Title I teachers are not controlled by the students, the benefit does not flow directly to them (Br. 41) is plainly a non sequitur.[11]

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[10] It is in this connection that the distinction between supplemental and substitutionary courses, discussed in our opening brief (at 7, 9, 32), is significant. See Appellees' Br. 22. Courses that are strictly supplemental, *i.e.*, not otherwise offered, benefit the students; courses that supplant or substitute for the school's own offerings, in contrast, benefit the school by relieving it of an obligation or expense. The assertion of amici curiae the American Civil Liberties Union, et al. (Br. 18), that such a distinction is "both educationally indefensible and wholly impractical" will come as a surprise to federal, state, and local educational officials who regularly apply the distinction (under the "supplement, not supplant" provision of Title I, now 20 U.S.C. 3807(b)) in both public and nonpublic schools. There is a well-established body of law, developed independently of the Establishment Clause, that governs this area. See *Secretary of Education* v. *Kentucky*, cert. granted, No. 83-1798 (Oct. 1, 1984). This Court therefore need not now decide the constitutionality of programs that go beyond supplemental, nonsubstitutionary offerings.

[11] Appellees purport (Br. 41) to distinguish *Board of Education* v. *Allen*, 392 U.S. 236 (1968) on the basis that the textbooks there were requested and then held by the students. However, in *Allen* the request could in fact be made on behalf of groups or classes of students by a "private school official" (*id.* at 255 (Douglas, J., dis-

5. The gist of appellees' argument that the Title I program entails excessive entanglement between religious and governmental authorities is not, as the court of appeals would have it, that there is or must be intrusive "surveillance" of Title I teachers by public school authorities (cf. J.S. App. 36a). Indeed, appellees state (Br. 47-48) that there has been relatively little surveillance of that sort.[12] Rather, appellees contend that the mere "interaction" between Title I teachers and their private school counterparts is the source of the entanglement. See *id.* at 46, 48.

As noted above, appellees' vision of the degree of interaction between Title I and private school teachers is greatly exaggerated. It is a matter of so little

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senting)). Indeed, the Title I program would seem less problematic than that in *Allen*, since the textbooks in *Allen* were selected by the private schools for use in their own curriculum, while the Title I instruction here is strictly developed and controlled by public school authorities.

[12] In fact, appellees complain that there is not enough surveillance (Br. 48). They seem to assume that the separation of church and state requires continuous monitoring of all contacts between public school teachers and private school students and teachers that occur on the premises of private schools, lest those contacts be turned to religious ends. But the argument proves too much, for it is based on assumptions that cannot be limited to Title I instruction given on religious school premises. If public school teachers are minded to smuggle religion into their teaching, why should they do so only on the premises of religious schools?

Underlying appellees' assertions is an unexamined skepticism about the professionalism and integrity of our public school teachers. The principle of separation of church and state has never been thought to require us to have a religious test for our public school teachers in order to screen out those who are personally devout. Our tradition is to assume that, within a decent and professional context of supervision, our teachers can be trusted to keep their personal religious convictions out of the classroom. Why should this trust wholly disappear when we send these same teachers into private schools to teach remedial math and English?

importance in the context of the program as a whole that it was not even discussed in the lengthy opinions of the courts below. But even assuming a degree of interaction exceeding that revealed by the record, it misapprehends this Court's precedents to find in such contacts an unconstitutional entanglement between Church and State. This is for two reasons.

First, this Court's principal concerns in this area relate to students, not to teachers; to children, not to adults. The possibilities of subtle religious indoctrination that have guided this Court's decisions regarding elementary and secondary schools have not been applied to colleges and universities (see *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 686 (1971)) or to adults in other contexts (*Marsh* v. *Chambers*, No. 82-23 (July 5, 1983), slip op. 8-9). Whatever surveillance might be thought necessary to protect schoolchildren from indoctrination is simply not needed to protect Title I and other teachers during their private consultations.

Second, and more fundamentally, this Court's concern about entanglement does not arise from mere contact or interaction between religious and governmental officials. See *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 3-4; *Walz* v. *Tax Commission*, 397 U.S. 664, 676 (1970). The concern arises only when the contact brings government to bear on matters of religion (or vice versa). See, *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971) (the purpose of the entanglement inquiry is "to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other"). Thus, in *Lemon* and *Meek*, this Court was concerned lest the government become embroiled in religious judgments because of the need for surveillance of the religious school

teachers involved. Here, the record clearly shows that the consultations between Title I teachers and their private school counterparts are confined to Title I matters and do not touch in any way on religion. (J.A. 51-52). This form of professional interaction is far from the "comprehensive, discriminating and continuing state surveillance" of personal beliefs and religious practices at issue in *Lemon* (403 U.S. at 619).[13]

6. Appellees' various arguments form a consistent theme. Without denying the legitimate secular, educational purpose of the Title I program, or the serious educational reasons why New York has come to rely on an on-premises approach, appellees put forward a miscellany of hypothetical and speculative objections, not supported by the record, designed to frustrate or block effective achievement of the congressional purposes. We believe the program should be judged on its merits. If this Court were to decide that, on account of the Establishment Clause, children who choose to attend religiously oriented private schools must forfeit their right to participate in remedial educational programs intended by Congress to be available to all, then the program must fail. But it should not be invalidated on the basis of conjectures with no relationship to the actual workings of the program.

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[13] If any interaction, even of a wholly nonreligious nature, between agents of the government and agents of a religious organization constituted an "entanglement" between church and state, many relationships between religious and governmental authorities, now considered unobjectionable, would become suspect. These would include medical consultation in the context of religious hospitals, state accreditation of private religious schools, governmental cooperation with religious institutions serving the homeless, and even police and fire protection for churches and synagogues. This Court has made clear, however, that such contacts between governmental and religious institutions are constitutionally permissible. See, *e.g.*, *Everson* v. *Board of Education*, 330 U.S. 1, 17-18 (1947).

For these reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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